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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 KICKSTARTER, INC.,

4 Plaintiff,

5 v.

11 Civ. 6909 (KPF)

6 FAN FUNDED, LLC and
7 ARTISTSHARE, INC.,

8 Defendants.
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9 New York, N.Y.
10 October 23, 2013
4:45 p.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 FOLEY & LARDNER
Attorneys for Plaintiff
16 BY: ROBERT J. SILVERMAN

17 LANDO & ANASTASI
Attorneys for Defendants
18 BY: CRAIG R. SMITH

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1 (Case called)

2 MR. SILVERMAN: Yes, your Honor. Robert Silverman for
3 the plaintiff, Kickstarter.

4 THE COURT: Good afternoon, sir.

5 MR. SMITH: Good afternoon, your Honor, Craig Smith on
6 behalf of the defendants Fan Funded and Artistshare.

7 THE COURT: Let me begin by thanking you for your
8 patience. We had a jury verdict come in this afternoon. At
9 some point they were going to come back, they just happened to
10 come back at a time that influenced this. When I went back to
11 speak with the jury they had a lot of questions for me about
12 the litigation process and I, therefore, was kept back there
13 for about half an hour and maybe that would be about 25 minutes
14 longer than I expected. I thank you for your patience.

15 As I understand it, gentlemen, we are here on two
16 issues. And one is the continuation, or not, and length, or
17 not, of the deposition of Mr. Camelio from Artistshare. And
18 the second is the issue of invention date, priority date.

19 Mr. Silverman, let me hear you first on the question
20 of the deposition.

21 MR. SILVERMAN: Yes, your Honor. Mr. Camelio is the
22 CEO, founder of Artistshare.

23 THE COURT: He was here at the last conference. Take
24 my word for it.

25 MR. SILVERMAN: I'll take your word for it, your

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1 Honor. Thank you. He was designated as the Rule 30(b)(6)
2 designee on every topic that was in our notice to the
3 defendants. And we took his deposition on those issues and we
4 made it clear, your Honor, to Artistshare prior to the
5 deposition that we were expecting Mr. Camelio would be prepared
6 on the 30(b)(6) topics. And there was actually a conference
7 before your Honor just a day or so before Mr. Camelio's
8 deposition which took place on August 16. I think there was a
9 conference on August 15.

10 THE COURT: It was the 15th, yes.

11 MR. SILVERMAN: When he was here. For whatever
12 reason, there wasn't a court reporter at that conference.

13 Our understanding was that it had come up that
14 Mr. Camelio would, of course, have his individual deposition
15 later on. The parties had a different memory about that. But,
16 in any event, we later advised Artistshare that we wanted to
17 have a date for Mr. Camelio's individual deposition and the
18 issue came up, is this necessary and, if so, for how long.

19 From our point of view, your Honor, Mr. Camelio is
20 involved in every aspect of this company and really in every
21 aspect of the issues in this lawsuit. He was not only the
22 inventor and the founder, main employee of Artistshare, but he
23 also was the person who made the threat to Kickstarter of
24 patent infringement that led to this lawsuit in the first
25 place.

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1 So the issue has come up, would this deposition be
2 restricted to four hours and that would be enough to cover the
3 more issues. But for the more recent events, that we will get
4 to second in your Honor's agenda, but we simply don't know
5 whether four hours would be adequate or not. Were we to have
6 an individual deposition of Mr. Camelio, we wouldn't want to be
7 restricted going into it.

8 THE COURT: Thank you.

9 Mr. Smith, you were at the last conference.

10 MR. SMITH: Yes, your Honor.

11 THE COURT: As was I, as was my very thoughtful law
12 clerk who took near a transcript of the proceedings. I trust
13 him implicitly as he has given this to me.

14 And it appears that it was advanced by plaintiff that
15 Mr. Camelio will be produced tomorrow as a 30(b)(6) witness and
16 at that time the Foley & Lardner partner who is not
17 Mr. Silverman said, we may need more than tomorrow alone, but
18 we will have a different view of it at the end of tomorrow. We
19 would continue the deposition in his individual capacity,
20 prompting me to ask whether he could be a witness in both
21 capacities, and you start to say that the idea of Mr. Camelio's
22 deposition going on for multiple days, when the case is
23 confined to the invalidity issue, seems like they are just
24 taking the head of the company out of business when there is a
25 very small issue left in the case, which did sound about what

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1 you would said.

2 And I said that the risk of putting someone in Mr.
3 Camelio's role forward as the 30(b)(6) witness risks extending
4 the deposition because he has multiple capacities. I'm not
5 surprised that it might last longer. It was my hope that the
6 plaintiff would not maliciously extend it. It's going to be
7 extended. The four hours is fine. More than four hours is
8 fine. Don't be stupid about it. It was contemplated that it
9 would go on. If you'll excuse my candor, that's less
10 interesting to me than this priority date issue. I don't know
11 who wants to speak on it first.

12 Mr. Smith, since you are standing, I'm happy to hear
13 from you.

14 MR. SMITH: Sure, your Honor. Thank you.

15 So the issue came up in the context of there has been
16 a number of interrogatories and there has been deposition of
17 Mr. Camelio relating to conception, when he conceived of his
18 idea.

19 THE COURT: Is it not the case, sir, that the most
20 recent response speaks of a priority date in 2001, when for
21 some period of time the operative priority date or invention
22 date had been the summer of 2000?

23 MR. SMITH: No, your Honor. I think Kickstarter was
24 taking language out of a letter, but was suggesting it meant
25 something that it didn't. And by that, I mean, we have always

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1 put in our interrogatory and we have always stated and Mr.
2 Camelio has stated in his deposition that his recollection is,
3 he came up with the idea in the summer of 2000. What was in
4 the letter that Kickstarter had cited to is the fact that we
5 also put into the letter that we have evidence showing
6 different things that he worked on. One of the things that he
7 was working on was the source code relating to the idea that he
8 had come up with. And some of that is dated in the 2001 time
9 frame.

10 And so we had identified for them in one of our
11 interrogatory responses some of the documents and information
12 that we have been able to discover about what he was working on
13 after the conception date, after he came up with the idea, what
14 was he doing and what did he come up with. And so the 2001
15 date was one data point that we were showing. You can see
16 here, he is working on source code for the invention. And so
17 we have highlighted that for them in our interrogatory
18 response.

19 From July of this year, we had put forward an
20 interrogatory indicating details about a whole narrative
21 relating to his recollection of how he came up with the idea,
22 things that he had worked on, was specifically mentioned that
23 he had started working on source code after he came up with the
24 idea, and we had given to Kickstarter the opportunity to
25 inspect the source code that we had, and they never did it.

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1 They never came in and said, let's look at source code that you
2 are talking about.

3 At his deposition Mr. Camelio testified consistent
4 with what the interrogatory states, that he conceived of the
5 idea in 2000, that he was working on various aspects of the
6 idea after the summer of 2000, including source code. He
7 indicated that he didn't remember working on specific types of
8 source code. He also indicated that he thought all that source
9 code had been disclosed to Kickstarter in this case, which it's
10 our belief that it had been because we had made it available
11 for inspection. None of that was addressed at Mr. Camelio's
12 deposition because none of it had actually ever been reviewed
13 by Kickstarter.

14 And then subsequent to that, Mr. Camelio discovered
15 that one of the hard drives that he thought was unreadable,
16 because he couldn't get access to it, he was able to figure out
17 a way to get access to it. So there was some additional source
18 code that we discovered, and we then produced that to
19 Kickstarter and said we have discovered additional source code,
20 we will make that available for inspection so you can see it.
21 We also supplemented our interrogatory response to indicate
22 that we had discovered this additional information so that they
23 would be aware of it.

24 I think what we are looking at now is an issue of
25 Kickstarter wants to file a motion, I think, for summary

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1 judgment to limit what date we get to rely upon. And it's our
2 position, they certainly can do that. It's our position --

3 THE COURT: They certainly can file the motion.
4 You're not consenting to it.

5 MR. SMITH: Exactly. What are we going to say? We
6 are not going to agree to the motion. We obviously oppose the
7 motion. But the timing of it, to us, doesn't make a lot of
8 sense, meaning there is already a deadline for motions for
9 summary judgment. I think what's likely going to be the most
10 efficient way to deal with things is that they are going to let
11 us know at some point whether it's an expert discovery or at
12 the time that they file their motion for summary judgment which
13 prior art they are actually relying upon, meaning they have
14 given us a whole laundry list of prior art that they might rely
15 upon, prior art that they are going to say invalidates the
16 patent in this case.

17 At that point in time that would be an important point
18 in time to determine whether or not we need to even address
19 this issue. The reason I say that is, if you look at the
20 dates, meaning the date that's fixed in time or the date when
21 the application was filed, so there is a provisional
22 application filed and then there was the utility application
23 that was filed. Those dates are fixed in time. They have
24 picked prior art, which goes back before those dates. Now,
25 some of those dates go back far enough that this whole issue of

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1 what date they were relying upon doesn't make any difference.
2 It's totally irrelevant.

3 There are other pieces of prior art that they might
4 rely on that might fall in between the date where Mr. Camelio
5 said we conceived of the idea and reduced it to practice and
6 the date that he actually filed his patent application. There
7 could be a piece of prior art that they rely upon that falls in
8 there. If they did, we would have the argument to say, now you
9 have put forward this prior art that falls within this range
10 here, and we can argue that we actually believe that because we
11 have a prior invention date, that piece of prior art wouldn't
12 actually qualify as prior art.

13 But for our way of thinking, until we know that they
14 are going to rely on art that fits in there, this seems a
15 little academic because if they decide not to rely on any prior
16 art that is in that range, to us that whole issue doesn't
17 really seem to come into play.

18 THE COURT: Let me ask you this question. What is the
19 invention date? What are the operative dates here? Because I
20 do remember from the last conference, there was a little bit of
21 a moving target nature to the dates. I'm not saying that was
22 intentional. I'm saying that was just my perception. So I
23 want to know, there is now a final answer on the question of
24 when the invention date was?

25 MR. SMITH: There are a number of different dates.

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1 THE COURT: I actually want all of them, all of the
2 operative dates.

3 MR. SMITH: For example, there is the date when the
4 utility application was filed, so that's the application that
5 ultimately matured into the patent that's in this particular
6 case. And so the filing date of that, I can't remember if it's
7 December of 2002. I don't have a copy of it in front of me, so
8 I can't give you the exact date. But prior to that there is
9 what's called a provisional application which also has a fixed
10 date. That date is July 8, 2002. That's another fixed date.
11 In some litigations there is no argument about any date before
12 that date, meaning there is no discussion of what happened
13 before the filing of your patent application because the
14 patentee doesn't rely on anything that gets them back before
15 that date.

16 THE COURT: But you do.

17 MR. SMITH: But we do.

18 THE COURT: Mr. Silverman would be happy if you were
19 just relying on the provisional application date, but I know
20 that's part of the reason we are here today.

21 MR. SMITH: Exactly, your Honor.

22 So the information that Mr. Camelio has testified
23 about, which is in the summer of 2000 he came up with the idea,
24 we don't have a napkin or something that says, you know, I,
25 Brian Camelio, have come up with this idea on this particular

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1 date on such and such day in 2000. We don't have something
2 like that. We have information from Mr. Camelio saying, this
3 is what I was working on at this time. We put that into our
4 interrogatory response to try to give Kickstarter the
5 understanding that we have as to how Mr. Camelio came up with
6 the idea and the time frame.

7 Then what we have are documents showing what he was
8 working on to get to the point where he said, okay, I not only
9 had the idea, but I have now been able to sort of put into
10 implementation this particular idea.

11 So what we have been providing to Kickstarter is that
12 information, meaning what are those dates where we show them
13 source code that Mr. Camelio worked on in 2001 or other
14 information that he was working on in that time period. So we
15 produced documents relating to those time periods. But there
16 is no one date that we have where we say, well, this is the
17 date where we say he conceived of the idea and that's a date
18 certain. Because he doesn't have enough of a memory from 13
19 plus years ago to say, here is the day I came up with. What we
20 have is his testimony about when he came up with the idea and
21 then documents showing what he was working on after the
22 conception of the idea.

23 THE COURT: Thank you very much. Let me hear from
24 Mr. Silverman.

25 Mr. Silverman, I may have misinterpreted plaintiff's

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1 letter to me, but I thought there was some suggestion that
2 there was an 11th hour change of heart by your adversary
3 regarding a particular date. He is suggesting that there
4 isn't, that they have been very consistent with what they have
5 said to you. If you disagree, tell me why.

6 MR. SILVERMAN: I do disagree, your Honor. If I may,
7 I have a copy of the most recent interrogatory response. I can
8 hand this up to your Honor if your Honor --

9 THE COURT: I'll let you read it from there. Thank
10 you.

11 MR. SILVERMAN: The problem that we have encountered,
12 your Honor --

13 THE COURT: Let me stop you for a moment.

14 Mr. Smith, you are aware of the document from which he
15 is reading?

16 MR. SMITH: If it's our last interrogatory response
17 from October 15, yes.

18 MR. SILVERMAN: Yes, your Honor, it is the October 15
19 response.

20 The problem that we encountered and the problem we
21 raised in our October 3 letter to your Honor was that when
22 Artistshare amended their interrogatory response the first time
23 on July 19, 2013, so this was roughly a month before the
24 Camelio deposition.

25 THE COURT: Therefore, a month before the conference

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1 before me where it was not raised.

2 MR. SILVERMAN: Exactly.

3 THE COURT: That doesn't help you.

4 MR. SILVERMAN: I'll tell you exactly why the issue
5 was raised the way it was. That interrogatory response said
6 that the invention was conceived in or about the summer of
7 2000, and there was a single document that was identified as
8 potentially relating to that summer of 2000 date. There is
9 also the patent application mentioned, but we know that that's
10 significantly later.

11 The document that was mentioned, and I can hand this
12 up, your Honor, if you like, it wasn't very helpful to us and
13 it's sort of almost a napkin that Mr. Smith had in mind.
14 That's ART11398. And we asked Mr. Camelio at his deposition
15 what is this document? Explain the conception.

16 Mr. Camelio didn't recognize the document. He didn't
17 provide any other information that would lead us to believe
18 that anything happened in the summer of 2000. Therefore, we
19 felt, well, now we understand that he has got a feeling that he
20 invented something earlier or came up with it earlier, but it's
21 not clear at all. And, therefore, we think that we should just
22 remove this summer of 2000 date from the possibility of being
23 an invention date of the patent and work with the date that is
24 on the patent application itself, the July 2002 date.

25 We proposed this to Artistshare. We said Mr. Camelio

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1 was the 30(b)(6) designee. Your interrogatory response
2 identified one document that might possibly be before the
3 filing date of the patent. And he didn't know anything about
4 it. Therefore, Kickstarter asked Artistshare to withdraw its
5 contention that there was a date of invention prior to the date
6 that the application was filed or the priority application was
7 filed.

8 THE COURT: When did you make that inquiry of
9 Artistshare?

10 MR. SILVERMAN: I believe it's in our letter to your
11 Honor. It was after the Camelio deposition, which was in
12 August. So I imagine it was some time in September that that
13 request was made, but I can't seem to find it in front of me.

14 In responding to our October 3 letter, we saw that on
15 October 7, Artistshare wrote to your Honor saying that Mr.
16 Camelio had prepared figures for the application at least as
17 early as 2001, based on the copyright notice. We have sort of
18 maybe 2001 is the date they are relying on. It's a little
19 unclear. And since it's mentioned here in the sentence, I want
20 an opportunity to inspect source code. Because Artistshare had
21 not in their interrogatory response identified any source code
22 that we should be looking at, we didn't think there was any
23 point in looking at source code that was perhaps embodying the
24 current product. Depending on the issues in the case, there
25 may have been a need to look at that. It was never brought to

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1 our attention that that might evidence an invention or
2 reduction to practice.

3 THE COURT: Mr. Smith, you're talking that the source
4 code is evidence of reduction to practice?

5 MR. SMITH: That's correct, your Honor.

6 THE COURT: Mr. Silverman, you now know that their
7 belief is that that source code is evidence of reduction to
8 practice.

9 MR. SILVERMAN: I learned that, your Honor, on October
10 7. But then on October 15, which was the date of the second
11 supplemental response to interrogatories 7 and 8. Actually,
12 since interrogatory number 8 is also about conception of the
13 invention, the invention date, it incorporates by reference the
14 response to interrogatory 7. So both of them were essentially
15 amended.

16 In that response, there is still this statement about
17 December of 2000. But this response of October 15, which is
18 the last day of the discovery period, goes on to identify many
19 other documents.

20 THE COURT: You are saying they had not been
21 identified previously, but they had been produced to you
22 previously, correct?

23 MR. SILVERMAN: That's correct, your Honor. They had
24 been produced. I should say, some of the documents had been
25 produced. They also produced quite a few documents right near

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1 the end of the discovery period, I believe October 7, so a week
2 before the close of the discovery period. But even though some
3 of these documents were produced, none of these documents that
4 appear in the October 15 amendment to the interrogatories were
5 brought to our attention as revealing any theory of invention
6 or conception or reduction of practice.

7 THE COURT: Remember, we don't practice patent law.

8 MR. SILVERMAN: Except for the ART11398 document,
9 which Mr. Camelio wasn't able to identify and couldn't give us
10 any information about anyway, so that document was not much of
11 a concern.

12 What was a concern is all these other documents that
13 are identified that involve a range of dates. There is one
14 document, ART18421, that supposedly evidences work as early as
15 October 2000. There is a document, ART18417, that deals with
16 events supposedly on February 2001. And this goes on and on
17 for quite a few more documents.

18 We are left, I think, with a couple of problems. The
19 threshold issue, your Honor, is, if we are not permitted to
20 seek a motion, file a motion seeking to restrict the date of
21 invention to the filing date, then to what extent is
22 Artistshare committed to make this amendment, producing some of
23 these documents a week before the close of discovery and then
24 finally articulating to some extent -- I say articulating
25 because we still don't have a very clear sense from this second

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1 time amended response exactly when the conception date was and
2 exactly when all the elements were in the mind of Mr. Camelio.

3 THE COURT: Let me stop you for a moment, sir.

4 You heard Mr. Smith speak to me a few moments ago.
5 And what he was describing to me was the fact that this
6 process, process that ended up in the filing or that resulted
7 in the filing of the provisional application and then the
8 utility application was not something that could be done sort
9 of overnight. It is not as though Mr. Camelio woke up one
10 morning with a fully-formed idea.

11 It's not surprising to me, although I will concede
12 this is not my normal line of work, that someone could have the
13 germ of an idea on one day and then identify other days at
14 which the germ took form. It was planted. It grew roots,
15 whatever. I can carry the metaphor only so long. That's not
16 surprising to me that there would be multiple dates.

17 I believe what Mr. Smith is saying is each of these
18 things that has been identified to you demonstrates the
19 evolution of the idea. And so while there is not a whole lot
20 in terms of the summer of 2000, they have at least identified
21 for you what, in their view, are the various pieces of evidence
22 that demonstrate the evolution of the product for which the
23 provisional application was filed. So that I do understand.

24 Now, what you are saying is some of them were produced
25 to you late and the identification of their relevance came to

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1 you later than would you like and perhaps at the end of
2 discovery. But what you are asking for, I think, and, is that
3 you'd like to establish through the partial summary judgment
4 motion is the idea that the earliest date that Artistshare can
5 claim is the date of the patent application, correct?

6 MR. SILVERMAN: Yes, your Honor. Now, if I may.

7 THE COURT: Please understand my skepticism with that
8 date because that sort of presupposes the very scenario that I
9 began with, which is, one day Mr. Camelio woke up with a
10 fully-formed idea. It's illogical for me to believe that it
11 would come out that way. I do think it's too much to limit
12 them to the date of the application.

13 To the extent there is any prejudice, and I'll talk to
14 Mr. Smith as to whether he thinks there is any prejudice and I
15 will resolve that issue. To the extent there is any prejudice
16 by sort of what you alleged to be the late identification of
17 the significance of materials to you, could that not be
18 alleviated by just extending fact discovery and allowing --
19 don't worry, Mr. Smith. I'll hear from you on this -- allowing
20 Mr. Camelio to speak further on these things that have been
21 identified following his deposition as things that were sort of
22 in his mind or that became the very steps in the evolution of
23 the patent?

24 MR. SILVERMAN: Thank you, your Honor.

25 The issue of prejudice has a number of different

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1 aspects to it. Because of our understanding of what the date
2 of invention was, at least certainly since July of this past
3 summer, we had been gearing our analyses and our prior art that
4 Mr. Smith referenced, thinking that, okay, there is this
5 argument about summer of 2000, but that's, we think, completely
6 unsupported by anything, including Mr. Camelio's testimony.
7 And then we have the date of the patent. So we are much more
8 comfortable sort of gearing our last discovery in the past few
9 months toward that target, if you will.

10 It's not simply that, oh, we have a new date now and
11 we can simply take some time, add some time to the discovery
12 period and adjust. It would really require us to recalibrate a
13 lot of our thinking and analysis as to what is the time frame
14 for that person of ordinary skill in the art. That could
15 change a lot in the computer fields from 2000 to 2001 to 2002,
16 and which references were available to which people and could
17 have spoken to someone at those various points in time.

18 I'll say it's a more complicated issue than simply
19 saying, oh, you can now have more discovery on what Mr.
20 Camelio's understanding was. I wanted to address that point.

21 THE COURT: The summer of 2000 date has been around.
22 I appreciate that you did not give it a tremendous amount of
23 credence because of the experience that you had at the
24 deposition. Summer 2000 was always the earliest possible date,
25 so I appreciate why you made the decisions you did with respect

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1 to the sort of prior art analyses you've been doing, but the
2 fact was, you had fair warning that summer 2000 was a date that
3 you should be focused on.

4 MR. SILVERMAN: If I may, your Honor, there is another
5 aspect to this. And part of the problem that we all deal with
6 is this sort of clunky 19th century metaphysics of patent law.
7 And, your Honor, completely correctly, I think, characterized
8 the way individuals come up with ideas as sort of an
9 evolutionary process, and you might have one piece of that idea
10 on one day, might be some time later that you combine it with
11 another one.

12 But the patent law definition of conception is when
13 all those pieces come together. The definitions that you see
14 in the cases are the definite formation in the mind of the
15 complete invention as it would be set forth in practice and
16 that sort of thing. So the evolution, the sort of prehistory
17 of the invention, is done when we get to the date of
18 conception. The date of the conception is when all the pieces
19 are together. It's simply a matter of putting it into
20 fabrication or building a machine that has been already fully
21 formed in one's mind. So the Athena, fully formed in the mind
22 of Zeus Coleman, is the date of conception.

23 THE COURT: Are you saying that you take issue with
24 counsel's identification of the summer of 2000 as the
25 conception date because to you conception date means more than

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1 the germ of the idea, but a less inchoate version of the idea.
2 Let me hear that.

3 Mr. Smith, if indeed it's just a germ, I guess I need
4 to know if you understood conception date as Mr. Silverman has
5 just described it to me, and if there is another date that I
6 should be aware of that is the conception date as he terms it.

7 I'll start with you, Mr. Silverman.

8 MR. SILVERMAN: Yes, your Honor. I don't think I
9 misunderstood Artistshare or Mr. Smith. I was using what I
10 thought was the correct understanding for date of conception.

11 I think another problem with the response that we got
12 on October 15, because it sort of gives this narrative of
13 various dates, various documents, including those late-produced
14 ones that I mentioned, your Honor, this does not show all the
15 pieces together.

16 So if we were to proceed, assuming your Honor would be
17 inclined to allow Artistshare to not have to step away from
18 this supplemental interrogatory response of October 15, we
19 would request that it be a more comprehensive response that
20 identifies the pieces of the claim, the elements of the claim,
21 and whether or not they are in the various documents
22 referenced.

23 Because it's similar to a problem that came up, I
24 think, on August 15, your Honor, when we were faced with the
25 provisional application. The provisional application differs

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1 in form from the utility application, the nonprovisional
2 application. Patent lawyers should come up with a better word
3 than nonprovisional, such as it is. And we had presented that
4 issue to your Honor and your Honor said it was indeed proper to
5 have Artistshare articulate which elements of the invention
6 appeared in which parts of that more rough application, and
7 they have done so.

8 We would ask the same thing confronted with this sort
9 of even less concrete response of October 15, because I think
10 your Honor raises an excellent point in terms of our
11 understanding between the parties that if indeed Mr. Smith and
12 Artistshare was saying that Mr. Camelio was really just getting
13 the germ of the idea back in the summer of 2000, maybe we were
14 just having different understandings of what conception of the
15 invention meant. And perhaps it's the case that the
16 fully-formed invention with all the pieces that make up the
17 elements of the claims were not together until somewhere
18 further down the narrative that is presented in the several
19 pages of the October 15 supplemental response.

20 THE COURT: Mr. Smith, let me take you to part of
21 Mr. Silverman's colloquy with me where he mentioned that under
22 patent law you cannot patent or you cannot use as your
23 conception date the first date you had some thought, however
24 random, about the idea. I presume what it is is there is some
25 tipping point where the idea is far enough along that you can

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1 call it a conception date.

2 Do you agree with his recitation of what the
3 conception date is?

4 MR. SMITH: I don't agree with the entire
5 presentation. I think he is right that conception isn't
6 just -- I think I might have an idea that could be relevant,
7 meaning conception requires more than that. It requires that
8 you have sort of a fully-formed idea that you could go forward
9 with. So in certain technology areas that could be really just
10 the idea that, oh, I am going to do this particular thing and
11 that's conception.

12 In other areas, where it requires a lot of
13 experimentation, for example, in the chemical or biological
14 arts, you might think that a particular compound would work,
15 but you may not be able to say you could conceive that it would
16 work until you have done more with it.

17 In this context I think conception can be the idea of
18 what Mr. Camelio described, which is he came up with this idea
19 of how can we make it easier for artists to be able to fund
20 their projects. You could have a website that would allow them
21 to market their projects and have fans being able to directly
22 fund them before they actually had to even make the project
23 that they are doing.

24 So instead of having the requirement that you go
25 through a record label or that you have some backer that is

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1 going to provide the money to you, you could have a situation
2 where your own fans could be the people who are saying, here,
3 we are going to give this to you to start you off and, in
4 return, we will get your next CD or copy of your next painting.

5 It's our belief that in the summer of 2000, Mr.
6 Camelio had the conception that was necessary for his
7 invention. He then started to diligently work on how he would
8 implement that, which we refer to in patent law as reduction to
9 practice. And so he had the conception. I don't want to say
10 it was just sort of the germ of the idea. But it was actually
11 the idea that, yes, this could actually work.

12 I think the problem that we are having is that
13 Kickstarter would like there to be the magical document that
14 says, oh, on this particular date this particular thing
15 happened, the light bulb went off eureka, I now have my
16 invention. It doesn't work that way. There is not that type
17 of document that says, I came up with this idea on this
18 particular date in this year of 2000.

19 And so what we have done is given them the best that
20 we have. We have given them Mr. Camelio's testimony. We have
21 put it into a interrogatory response as to how he came up with
22 the idea, what he was working on at the time, that sort of the
23 confluence of different factors that came together so that he
24 came up with this idea. And then we provided to them the
25 things that he was working on that we can document to show. So

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1 he had the idea, now he was starting to write computer code, to
2 actually implement it.

3 And so in our July interrogatory response we do
4 specifically mention they started working on source code after
5 he came up with this idea. So the notion that they had no high
6 no idea that the source code was relevant to this I take
7 exception to. We did mention in our interrogatory response in
8 July and we did also indicate to them that they could come and
9 inspect the source code that we are referring to, and they
10 never did.

11 And then they took Mr. Camelio's deposition. They
12 asked him about conception. He did tell them the story about
13 what he remembers about coming up with the idea. And he also
14 indicated that he started working on source code and he thought
15 that source code was available to Kickstarter. And, again,
16 they didn't show him any of the source code. They didn't talk
17 to him about what the source code was.

18 And so the fact of the matter is that the
19 supplementation which Kickstarter is representing as late was
20 not late. It was produced during the discovery period and it
21 was produced shortly after we discovered that there was
22 additional source code. It's not as if this was out of nowhere
23 we came up with this and said, now, there is source code
24 relevant to this case.

25 THE COURT: I care about that, but I also care about

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1 the element of gamesmanship, not to suggest that there is any,
2 but there is an appearance of gamesmanship of having stuff
3 produced or being identified on the last date of fact
4 discovery.

5 MR. SMITH: Kickstarter did the same thing. They
6 updated their interrogatories with a huge amount of additional
7 prior art that they are now relying upon. On the exact same
8 day that we sent them our interrogatory response saying, we
9 found some additional source code, we are updating our
10 interrogatory response to reflect that, they supplemented their
11 interrogatory response with a huge number of additional charts
12 and information on prior art.

13 It seems a little bit like they don't like when we do
14 it during the discovery period, but it's okay if they do it
15 during the discovery period. I think we both did it. We both
16 found out information that had to be produced. I don't think
17 there is any way we could have said to the Court or to
18 Kickstarter, we found this information and we are not giving it
19 to you.

20 We had to give it to them and we had to update our
21 things according to the rules. We couldn't hold it back. The
22 notion that there was gamesmanship I think is not true because
23 Mr. Camelio searched and searched to try to find the
24 information that was relevant. We produced the stuff that he
25 had found. And then he was able to figure out how one of his

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1 computer drives that hadn't been working, he could get
2 information off of it. When he told us that he was able to get
3 some additional information off of this drive, we produced it
4 immediately. And so it wasn't the situation where the source
5 code was something that we had and we waited until the last day
6 of discovery and then finally produced it. That's not the
7 situation. We had source code, we produced it back in July.
8 We mentioned it in our interrogatory response and then we found
9 some more source code and we produced it to them. I don't
10 think there is any prejudice here because they had the
11 information. The fact is, when they had source code they never
12 looked at it. They never asked our witness about it.

13 THE COURT: Presumably you would let them look at it
14 today. It's certainly available for their inspection.

15 MR. SMITH: Certainly. They asked that question, they
16 are going to say now that discovery is over that we can't look
17 at it. We said no. You can certainly look at it and inspect
18 it and see the source code and that's not a problem to us. And
19 we feel like we have not said that Mr. Camelio is not going to
20 get deposed again. Our only issue was, it seems like they have
21 already covered a huge number of the pieces of information they
22 want both on a personal level and a corporate level.

23 Our concern is, it just seems like it's starting to
24 veer into a little bit too much. We were acting for
25 restrictions. I know that issue has already been addressed.

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1 It's just that that is the framework within which all of this
2 came about. And so I don't think there is any prejudice here
3 because both sides did exactly the same thing, which is when
4 they had to supplement, they supplemented.

5 THE COURT: And you are claiming no prejudice from
6 their late supplementation of their responses?

7 MR. SMITH: No, your Honor. We feel like, obviously,
8 we would love everything sooner. But the fact of the matter
9 is, they supplemented within the fact discovery period. So
10 would we like things earlier? Sure. But we are not saying
11 that they have done something wrong by giving it to us on the
12 last day. If it turned out that they had this sitting in their
13 pocket for six months, we might have an objection, but there is
14 nothing yet to suggest that that's the case. So we feel like
15 both parties understood that they could supplement and could
16 provide additional documentation up until the end of the fact
17 discovery period and that's what we did.

18 THE COURT: Thank you.

19 Mr. Silverman, I am not able to prevent you from
20 filing a motion for partial summary judgment, but I can hint as
21 to how I would rule. And so let me give you this as the hint.
22 Tell me what we can do within reason in terms of an extension
23 of the discovery period to remediate any prejudice you think
24 you have. Because I have read the materials and I have thought
25 about them, too, and I can't stop you. I only have the ability

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1 to deny. And that's not a threat. It's simply an inclination.
2 And you may be able to persuade me with something longer than
3 three pages that there is more there. But I prefer, my own
4 just philosophy, as much as one can develop a judicial
5 philosophy in four months, is I would prefer the full and fair
6 exchange of ideas to sanctions or preclusion or limiting
7 people.

8 So since I have now told you that, what can be done?
9 Preferably, what can you and Mr. Smith agree to have done?

10 MR. SILVERMAN: Reading between the lines of your
11 Honor's remarks --

12 THE COURT: I am a master of subtlety, but go ahead.

13 MR. SILVERMAN: Reading between the lines of your
14 Honor's remarks, I would propose the following:

15 First of all, to make sure that the parties have the
16 same understanding about what conception is.

17 And if I may just digress for a second, your Honor, I
18 do apologize. Some of these issues came to a head yesterday
19 and I sent a letter to your Honor yesterday afternoon.

20 THE COURT: The 22nd. All the days are melting
21 together, but I did in fact read this.

22 MR. SILVERMAN: I realize that somehow it was a little
23 bit out of synch with your Honor's guidelines for civil cases,
24 but it seemed that it might be helpful to have that. Anyway, I
25 do apologize for that.

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1 By the way, I think in this vain the case that was
2 cited there, Hybritech case in the Federal Circuit, talks about
3 conception being the formation in the mind of the inventor of a
4 definite and permanent idea of the complete and operative
5 invention.

6 So Mr. Smith and I and the parties may have had maybe
7 not quite meeting of the minds as to exactly what conception
8 was, but it would be helpful for Artistshare to take a look at
9 their October 15 supplement and to perform that exercise of
10 saying, okay, here is where the sort of prehistory is
11 occurring. Here is where we actually have all of the pieces of
12 the invention together. And then if that's manifest in a
13 document, then they should point to that. If most of the
14 pieces are manifest in a document, but some aren't, but they
15 are proveable by testimony or some other fashion, that would be
16 helpful to know.

17 THE COURT: Let me stop you for a moment.

18 Mr. Smith, you just heard this. Are you familiar with
19 the Hybritech case of which he speaks?

20 MR. SMITH: Yes, your Honor.

21 THE COURT: And do you agree that that is an
22 appropriate way of defining the conception date?

23 MR. SMITH: I have not seen the exact quote that
24 Mr. Silverman was quoting from, but I think it sounds correct.

25 That looks correct, your Honor.

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1 THE COURT: What Mr. Silverman is saying is, perhaps
2 the parties do not have a meeting of the minds about the
3 conception date, but in the colloquy I just had with you I
4 thought that you did have this understanding of conception date
5 and you're simply saying, for a project of this type or an idea
6 of this type. The idea could be done in the summer of 2000,
7 even if its reduction to practice took a period of time and a
8 whole lot of source code.

9 Are you telling Mr. Silverman that your answer to any
10 question when was the conception date under a Hybritech theory
11 of the conception date is the summer of 2000?

12 MR. SMITH: That's correct, your Honor.

13 THE COURT: So you have an answer.

14 MR. SILVERMAN: Because we attempted to explore that
15 with Mr. Camelio in his original deposition, but there are many
16 other steps along the way that may ultimately be fallback dates
17 because we feel that still if the alternative is, summer of
18 2000 versus date on which the patent application was filed, we
19 feel as we felt on October 3 when I wrote to your Honor, if
20 that was the dichotomy, we thought there was no question, it
21 cannot be summer of 2000. If there are all these other dates
22 in between and if Artistshare is sort of reserving on the
23 possibility that maybe the date when all the pieces came
24 together was some time between summer of 2000 and the date when
25 they filed their application, we would want to have that

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1 articulated in a more complete response.

2 THE COURT: Hold on, Mr. Smith. Are you pleading in
3 the alternative here? Are you suggesting that if I were to
4 find that the conception date were not the summer of 2000, that
5 there are other dates, the dates that you've identified and the
6 source code that you have identified, which would instead
7 become the conception date?

8 You understand, Mr. Silverman, he is speaking of a
9 binary issue here where it's either 2000 or July of 2002. I
10 presume your view is that it's summer of 2000, but if it's not,
11 is it some date in between those two.

12 MR. SMITH: I think it can be, your Honor. I think
13 the issue is that, as I've said, there is not a document in the
14 summer of 2000. What they are looking for is, they are looking
15 for something that shows more than Mr. Camelio's testimony that
16 there was the conception of the idea.

17 THE COURT: Yes. But the document that was shown to
18 him he could not identify, according to Mr. Silverman.

19 MR. SMITH: I understand, your Honor. I think he
20 obviously was given a lot of documents at his deposition and
21 some of them he couldn't remember where they came from. Again,
22 these documents are coming from 13 plus years ago, so obviously
23 there is a long time period that has elapsed between then and
24 now.

25 The issue is, in terms of determining what the date

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1 would be, meaning if they say, okay, you have to fix a date,
2 not just based on his testimony, but based on something else,
3 some document, we have given them documents to be able to try
4 to fix that date.

5 And so we think that, yes, there could be a situation
6 in this case where if the date becomes relevant to any of their
7 prior art, we may have to go and say, okay. For this
8 conception date we have Mr. Camelio's testimony that he
9 conceived in 2000 and then this document or source code or
10 whatever shows this is what he was working on as of that
11 particular time. And so this would support the notion of
12 concession, but we don't have a document that says here in the
13 summer of 2000, Mr. Camelio came up with this idea. We don't
14 have a document. We have his testimony.

15 THE COURT: Mr. Silverman.

16 MR. SILVERMAN: If I may, your Honor, however it's
17 manifest in documents, testimony or testimony admitting the
18 documents together, we don't have a clear understanding from
19 their current interrogatory response what pieces were in place
20 when. And so if Artistshare were to take a look at the
21 documents that they reference in their interrogatory response
22 and use that in an explanatory fashion, much like they did with
23 their provisional patent application, saying, here is where
24 this element corresponds in this document and here is where
25 this element corresponds, and if they can build up the picture

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1 that way, I understand, there might not be a single document.

2 THE COURT: There might not.

3 MR. SILVERMAN: But whatever story they are trying to
4 build out of the documents referenced in their interrogatory
5 responses, what we like to understand -- and actually, I should
6 say, we would like to understand before we take Mr. Camelio's
7 deposition again, assuming he would be the person to explain
8 that. And also that we would like to know how all of that fits
9 together before we get to expert reports.

10 So I think Mr. Smith's suggestion that we might just
11 delay on this until we see which pieces of prior art are going
12 to be significant, I think that's not very practical.

13 THE COURT: Mr. Smith, you're being invited to provide
14 additional detail and I suppose you can look at this and say, I
15 don't have the obligation to do that because I have told you,
16 Judge and adversary, that it is the summer of 2000. I'm simply
17 telling you that there aren't the documents that I would wish
18 for to demonstrate that. But it is there and my client will
19 testify to that. You've just heard what Mr. Silverman said.
20 Is that something you can do?

21 MR. SMITH: I think we could do it, your Honor.

22 THE COURT: Is it something you would do?

23 MR. SMITH: I think we would do it. I think based on
24 the Court's local rules, this seems like it would be better
25 done through a deposition than us trying to write out a

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1 statement.

2 THE COURT: But who all is going to be the deponent?
3 Because Mr. Camelio, I am not sure he can, with precision, do
4 this. That's my concern. If they depose him and he says I
5 don't know, we are going to go back here again and you don't
6 want that.

7 You have pieces of source code, yes?

8 MR. SMITH: Yes, your Honor.

9 THE COURT: These are some of the milestones for you
10 in terms of dates. Are there identifiable dates in the source
11 code?

12 MR. SMITH: There are, your Honor.

13 THE COURT: And can you identify the import of the
14 particular piece of source code?

15 MR. SMITH: Meaning what does it reference or what
16 does it show?

17 THE COURT: Yes.

18 MR. SMITH: Yes, we can, your Honor.

19 THE COURT: Seems that you don't have to depose
20 anybody on it. I am not going to stop you if you guys want to
21 do it by deposition. I'm just concerned in seeing you in six
22 weeks and saying Mr. Camelio gave it his very best shot and
23 there were many documents shown to him and it was many years
24 ago, it's unrealistic to think that he could know all of that.

25 My preference would be, if you can and you will do it,

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1 try and do it with reference to the various documents. But
2 that gets us part of the way there. I, again, am trying to
3 understand what needs to be done, not what you'd like to do and
4 what remedies I should provide for perhaps bad bets on the
5 conception date. What needs to be done and how quickly it can
6 be done because I want to get this case moving along. I'm sure
7 you do, too.

8 Thank you, Mr. Smith.

9 Mr. Silverman, that's one thing. You have just gotten
10 something. He has agreed to do it. I'll leave it to you guys
11 to find a date by which it should be done. What else do you
12 need? I presume what you are saying is, you need it prior to
13 the retaking or the day 2 of Mr. Camelio's deposition.

14 MR. SILVERMAN: Yes, your Honor. So to sort of make a
15 suggestion about what might happen between today and the next
16 time we are before your Honor, hopefully not on a discovery
17 issue, of course.

18 THE COURT: Hopefully not.

19 MR. SILVERMAN: I would say that Mr. Smith and I might
20 confer about whether he could, and would, together with his
21 clients and colleagues, craft another supplemental response
22 that sort of details what each of the documents is to be
23 referencing and which elements of the invention, if possible,
24 came up, what time frame would be feasible for Artistshare to
25 do that, and then assuming we can proceed to a deposition when

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1 a reasonable date for that would be. That would be my
2 suggestion as to a path forward.

3 THE COURT: I'm not opposed to that.

4 Mr. Smith, are you opposed? You have just heard what
5 he said, correct?

6 MR. SMITH: Correct, your Honor.

7 THE COURT: Can you meet and confer with him on these
8 issues?

9 MR. SMITH: Certainly, your Honor.

10 THE COURT: Do you want to do it here and now or would
11 you rather get back to me by the end of the week with a
12 proposal?

13 MR. SMITH: I think it would be easier if we could
14 just talk and discuss it amongst ourselves and then get back to
15 you.

16 THE COURT: You are not going to be greedy, correct,
17 with any requests for extensions because I presume this is
18 going to impact other dates in the case management, and I think
19 you should think about looking at the source code because
20 apparently it's there for you to look at if you want to.

21 So today is Wednesday all day. I say that because my
22 days have been melting together. By Friday close of business I
23 would like a proposal from the parties as to how we can resolve
24 whatever issues exist on discovery without resorting to things
25 like sanctions or summary judgment motions or motions to

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1 preclude or anything of that type.

2 Yes. There will be a second day of Mr. Camelio's
3 deposition and you guys can work out the specifics of that.

4 I think that was productive. Is there anything
5 further we need to discuss?

6 MR. SILVERMAN: Nothing from our side. Your Honor.
7 Thank you.

8 MR. SMITH: Nothing, your Honor.

9 o0o